

**DASON GABAN v.
ZULKIFLE BIN MAJUN AND 21 OTHER CASES**[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) &
Hashim Yeop A. Sani J.)

December 23, 1981 & February 12, 1982]

[Kuala Lumpur — Federal Court Civil Appeals
Nos. 238 to 257 of 1981]

Election — Election Petitions — Application to strike out petitions — Application dismissed — Whether appeal lies to Federal Court — Election Petition Rules, 1954, rr. 4, 12, 15, 18, 22 & 23 — Election Offences Act, 1954, ss. 33 & 36 — Courts of Judicature Act, 1964, ss. 67 & 68.

In this case a number of election petitions were presented in the High Court at Kota Kinabalu, Sabah. The applicants argued in 20 of the petitions that the petitions should be struck out on the grounds *inter alia* of failure to comply with the provisions of rules 3, 4, 12 and 15 of the Election Petition Rules, 1954 and section 34 of the Election Offences Act, 1954. The learned judge rejected all of the applications and refused to strike out any of the petitions. The applicants appealed to the Federal Court.

Held: (1) there is no inherent right of appeal to the Federal Court. Such a right if any must be granted by statute;

(2) section 67(1) of the Courts of Judicature Act, 1964 allows an appeal from any judgment or order of any High Court but in this case the order appealed from was not made in exercise of the ordinary jurisdiction of the High Court Judge but of the special jurisdiction of an Election Judge, having been specially so nominated by the Chief Justice under section 33 of the Election Offences Act, 1954;

(3) the order in this case was made by the learned judge as an Election Judge and not as a High Court Judge;

(4) the Federal Court therefore has no jurisdiction to hear the appeal.

Cases referred to:-

- (1) *Devan Nair v. Yong Kuan Teik* [1967] 1 M.L.J. 261.
- (2) *Re Perting Timor Election (No. 2)* [1962] M.L.J. 333.
- (3) *Joseph Theberge v. Philippe Laundry* (1876-7) 2 App. Cas. 102, 106.
- (4) *Lord Strickland v. Giuseppe Grima* [1930] A.C. 285, 296.
- (5) *De Silva v. A.G. for Ceylon* [1949] W.N. 248, 249.
- (6) *Senanyake v. Navaratne* [1954] A.C. 640, 651.

The following cases were also cited in argument:-
Nagappa Rengasamy Pillai v. Lim Lee Chong [1968] 2 M.L.J. 91; *Arzu v. Arthurs* [1965] 1 W.L.R. 675.

FEDERAL COURT.

Raja Abdul Aziz Addruse for the appellants, assisted by

Dr. Yaacob Hussain Merican in Appeals Nos. 240, 243, 249, 250, 254 and 256.

Chong Kah Kiat in Appeals Nos. 238, 241, 244, 245, 247 and 248.

Clement A. Skinner in Appeals Nos. 239, 242, 246, 255 and 257.

John Kah for the appellants in Appeals Nos. 251, 252 and 253.

Dominic Puthuchear for the respondents, assisted by

Abdul Razak Rouse in Appeals Nos. 238, 239, 240, 241, 242, 244, 251, 256 and 257.

Datu Nasrun Datu Mansor in Appeals Nos. 243, 245, 246, 247, 248, 249, 250, 252, 253, 254 and 255.

Cur. Adv. Vult.

A **Suffian L.P.** (delivering the judgment of the Court): These are appeals from the decision of George Seah J., dismissing the applications of the appellants ("the applicants") that certain election petitions presented in Kota Kinabalu be struck out on various grounds.

On Wednesday, December 23, 1981, we dismissed the appeals with costs and now give our reasons. In these appeals we only considered the question whether or not the Federal Court had jurisdiction to entertain them.

B A total of twenty-six election petitions numbered 1 to 26 of 1981 were presented in the High Court at Kota Kinabalu, Sabah, challenging the elections of 26 members of the Sabah Legislative Assembly from various constituencies in the State following publication in the *Gazette* on April 23, 1981, of the results of the State Elections held in the previous March. Each petitioner alleges that each of the 26 respondents therein (i.e. the applicants) was personally or by his agents guilty of corrupt practices of aiding, abetting or procuring the commission of the offences of bribery, treating and undue influence before, during and after the said election contrary to the provisions of sections 8, 9, 10 and 32(a), (b) and (c) of the Election Offences Act, 1954 (Revised 1969) ("the Act"). Each petitioner therefore prays for a determination that the 26 applicants were not elected or returned and that the said elections be declared void. Each petitioner deposited a sum of \$3,000 as security and gave notice of the presentation of his election petition in *The New Straits Times* on May 28, 1981.

C Subsequent to the publication in *The New Straits Times*, notices of motions were taken out by all applicants to have the 26 election petitions struck out on the grounds, *inter alia*, that the petitioners had failed to comply with the provisions of rules 3, 4(1)(b), 12(1) and (2) and 15 of the Election Petition Rules 1954 ("the Rules") and section 34 of the Act.

D Following the filing of the notices of motions, the petitioners in Petitions Nos. 1, 3, 6 and 26 applied for leave to withdraw their Petitions. We are not concerned with these Petitions.

E By consent, the notices of motions in respect of the other 22 petitions were heard together.

F In the course of the hearing, Mr. Dominic Puthuchear conceded that the petitioner in Petition No. 7 was not a candidate in the election for the constituency ward N 12 (Labuk) and that he had no *locus standi* to present an election petition under section 34(c) of the Act. In view of this the learned judge struck out the petition. On November 11, i.e. two days after delivery of the judgments appealed from, leave was given for the withdrawal of Petition No. 13. In these appeals we are not concerned with these two petitions either.

G For the record, in these appeals we are concerned only with petitions Nos. 2, 4, 5, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25.

H Before Seah J. the applicants argued that these 20 petitions should be struck out on three grounds.

I The applicants contended first that six petitioners (in petitions Nos. 4, 13, 15, 18, 22 and 23) had not

complied with rule 4(1)(b) of the Rules; secondly that none of the petitioners had complied with rule 12(1) and (2) regarding the deposit of security for costs; and thirdly that none of them had complied with rule 15 in that they failed to serve their petitions by publishing a notice in newspaper circulating within the constituencies in which the elections were held.

There is no need to give details of these arguments, because they appear in full in the judgment appealed from. Suffice it to say that the learned judge rejected all of them and refused to strike out any of the petitions. If the matter had rested there, this would mean that the judge should next proceed to hear the merits of each of these petitions and determine the matters in dispute accordingly.

But the applicants appealed to this court.

By consent these appeals were heard together as the same three points arose in each of them, and also by consent we dealt for convenience only with Appeal No. 250 of 1981 arising out of petition No. 18, it being agreed that what we decided in that appeal would apply to the others as well.

We dismissed these appeals without hearing arguments on these points — because in the event we agreed with Mr. Dominic Puthuchear's preliminary objection that we have no jurisdiction to hear them.

He made two points: first, that the orders appealed from were interlocutory, appeals from such orders required leave under section 68(2) of the Courts of Judicature Act 1964 and here no leave was applied for or granted. Secondly, that if the orders were not interlocutory orders, then by virtue of section 36 of the Election Offences Act 1954 they were final orders and no appeal lies at all to the Federal Court. He cited various authorities for these propositions.

In answer, Raja Abdul Aziz for the applicants before us said as regards the first point, that section 68(2) of the Courts of Judicature Act which regulates appeals from interlocutory orders and provides that they must be with leave, relates to interlocutory orders made by a judge in chambers, and that the orders made here were interlocutory orders made by a judge in open court after considering the applications which were made by way of notices of motion, and therefore no leave was necessary. In the case of *Devan Nair v. Yong Kuan Teik*,⁽¹⁾ a Privy Council case leave was necessary, as in fact there was leave there. There the Privy Council drew a distinction between an order made under section 33(4) of the Act, i.e. an interlocutory order in connection with an election petition dealt with and decided by any Judge of the High Court, which is appealable with leave; and on the other hand a determination by an Election Judge under section 36 of the Act, which determination must be certified by him, and which, in the words of the section itself, "upon such certificate being given shall be final", i.e. not appealable.

On the second point Raja Abdul Aziz argued that *Re Perting Timor Election (No. 2)*,⁽²⁾ the judgment of the Court of Appeal, our predecessor, deciding that there is no appeal from an interlocutory order of an election judge is no longer good law in view of the subsequent judgment of the Privy Council

A in *Devan Nair*;⁽¹⁾ and he drew our attention to this passage from page 263 in the second column of that judgment:

"Looking at sections 33 and 36 [of the Election Offences Act, 1954], while it is clear that section 36 enacts that final orders are not subject to appeal, there are no such limiting words in section 33(4), and it does not seem to their Lordships there is to be found in that section sufficient to overcome the express words of section 67 of the Courts of Judicature Act 1964 already quoted, so as to preclude the bringing of an appeal in an interlocutory matter."

Raja Abdul Aziz then drew our attention to the fact that in the four cases relied on in *Perting Timor Election (No. 2)*:⁽²⁾ namely, *Joseph Theberge v. Philippe Laundry*,⁽³⁾ *Lord Strickland v. Giuseppe Grima*,⁽⁴⁾ *De Silva v. A.G. for Ceylon*⁽⁵⁾ and *Senanayake v. Navaratne*,⁽⁶⁾ each of the orders appealed from was a final order in contrast to the interlocutory orders appealed from here; and so, he said, none of them was authority for the proposition that there could be no appeal from an interlocutory order made in an election petition.

D We dismissed these appeals because there is no inherent right of appeal to us, such a right if any must be granted by statute, and if there is any right of appeal at all it must be under section 67(1) of the Courts of Judicature Act. That section provides:

"(1) The Federal Court shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to the provisions of this or any other written law regulating the terms and conditions upon which such appeals shall be brought."

Be it noted that what that section allows to be appealed from is "any judgment or order of any High Court".

F Here however while it is true that Seah J. was a Judge of the High Court, he made the order appealed from not in exercise of the ordinary jurisdiction of a High Court Judge but of the special jurisdiction of an Election Judge, having been specially so nominated by the Chief Justice under section 33 of the Election Offences Act.

G Some argument, as has been noted, was directed to the provision of subsection (4) of section 33 of the Act which provides that interlocutory matters in an election petition may be decided by any High Court Judge, yet here again it should be noted that the orders Seah J. made were made by him as an Election Judge, not as a High Court Judge.

H Our decision was much influenced by the philosophy behind the legislation in England and other Commonwealth countries, on which our own Act is modelled, and that is that constitutionally the validity of an election was decided by the Assembly for which the election was held, that historically it used to be so decided, but in the course of the 19th century many countries adopted the view that, as the deliberations of the Assembly itself were apt to be governed by political considerations rather than by the justice of the case, it was right and proper that such questions should be entrusted to independent and impartial courts. This required legislation in every case, and in many cases the right of appeal after the hearing of an election petition by the election tribunal to which those hear-

ings were entrusted was severely limited, clearly for the reason that it was essential that such matters should be determined as quickly as possible, so that the Assembly itself and the electors of the representatives thereto should know their rights at the earliest possible moment. This philosophy may be gleaned from many of the decisions cited to us, and in particular from *Devan Nair*,⁽¹⁾ page 262.

Section 36 of the Act gives effect to this philosophy by providing that at the conclusion of the trial of an election petition the Election Judge must determine whether the candidate whose return or election is complained of, or any other and what person, was duly returned or elected, or whether the election was void, and must certify such determination to the authorities set therein; and that "upon such certificate being given such determination shall be final".

If such a determination cannot be appealed from because it is essential that such matters should be determined as quickly as possible, so that the Assembly itself and the electors of the representatives thereto should know their rights at the earliest possible moment, would it not be absurd if a successful candidate whose election is challenged is allowed to delay and protract the petition brought against him by obtaining one interlocutory order after another and then appealing against them all the way to the highest court of the land?

It is true that the advice of the Privy Council in *Devan Nair*⁽¹⁾ gives us some difficulty; but we prefer to hold that that decision is only authority for the facts therein which are peculiar to itself (the order appealed from there to strike out the petition was a final one, it was made in chambers on a summons, and yet leave to appeal was granted), which facts are quite different from the facts in these appeals.

In that case their Lordships did not seem happy that a final order was treated as an interlocutory order, for Lord Upjohn said at page 263:

"Whether he [the learned judge] was right so to treat his order is a matter which their Lordships do not decide; they think that it is a doubtful point and it would have been better if in terms he had dismissed the petition when no question [of appeal] could have arisen. They will assume that he was right in thinking that for the purposes of the appeal he was making an interlocutory order."

His Lordship then added significantly at page 264:

"Nevertheless, their Lordships would like it to be understood that they are reluctant to entertain interlocutory appeals especially in election petitions and unless the case raised is of exceptional public and general importance the Federal Court may well think it wiser to leave the party aggrieved to apply to their Lordships' Board for special leave to appeal under section 74(2) of the Courts of Judicature Act 1964."

The above observation is significant in that it shows their Lordships' view that the courts should not encourage appeals even from orders that do not finally dispose of the disputes.

It seems to us that Parliament should consider the ambiguity in the law disclosed in these appeals, decide as a matter of policy whether or not interlocutory orders made in an election petition should be appealable and legislate accordingly.

Order accordingly.

V. SUBRAMANIAM & ORS v. CRAIGIELEA ESTATE

[F.C. (Suffian L.P., Salleh Abas & Abdul Hamid F.JJ.)
January 14 & February 19, 1982]

[Kuala Lumpur — Federal Court Civil Appeal No. 61 of 1977]

Administrative Law — Certiorari — Award of Industrial Court — Error of Law — Industrial Court acting within jurisdiction — High Court has no jurisdiction to quash award — Industrial Relations Act, 1967, s. 29(3)(a).

Industrial Law — Strike — Termination of employment — Reference to Industrial Court — Reinstatement ordered — No error of jurisdiction — Certiorari cannot be issued to quash award — Probationer — Whether deemed to be confirmed at end of probation period — Industrial Relations Act, 1967, s. 29(3)(a).

In this case the appellants were employed on probation by the respondent estate. At the end of their probationary period they continued in service, but none had been confirmed. They joined in a strike organised by the Union to which they belonged. The respondent estate informed the appellants that as they had been absent from work without lawful or reasonable excuse for more than two consecutive days, the estate had terminated their employment. The matter was referred to the Minister who eventually referred the matter to the Industrial Court. The Industrial Court ordered reinstatement of the appellants as confirmed in their appointments. The respondent estate applied for an order of certiorari and the High Court made an order quashing the award. The appellants appealed to the Federal Court.

Held: (1) the Industrial Court had jurisdiction to consider and determine the issues formulated by them in this case and in doing so the Industrial Court did in no way exceed its jurisdiction. The High Court therefore had no jurisdiction to quash the award of the Industrial Court;

(2) the Industrial Court was in error in holding that a probationer who at the end of his probationary period has not been confirmed or told to go must be regarded as having been admitted into permanent service. This error of law did not go to jurisdiction and gave no power to the High Court to quash the award;

(3) the award was severable and the High Court could quash that part which was a mistake without touching the rest;

(4) the order of the Industrial Court should be restored save that the employees be reinstated only as trainees or on probation, as the case may be.

G Cases referred to:-

- (1) *South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union & Ors.* [1980] 2 M.L.J. 165.
- (2) *Anisminic v. Foreign Compensation Commission* [1969] 2 A.C. 147.
- (3) *Express Newspapers (P) Ltd. v. Labour Court* A.I.R. 1964 S.C. 806.

H

The following cases were also cited in argument: *South-East Asia Firebricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union & Ors.* [1975] 2 M.L.J. 250; [1976] 2 M.L.J. 67; *National Union of Commercial Workers v. Lindteves-Jacobson (M) Sdn. Bhd.* [1981] 1 M.L.J. 242; *Re Dunlop Estates Bhd.* [1981] 1 M.L.J. 249; *The Queen v. Clarkson & Anor.* (1975-76) 134 C.L.R. 56; *Jaipur Udyog Ltd. v. Cement Work Karmachari Sangh* [1972] 3 S.C.R. 296; (1972) 1 S.C. Cases 691; *Delhi Cloth & General Mills Co. Ltd. v. Workmen* [1969] 2 S.C.R. 307; *Calcutta Electric Supply Corporation Ltd. v. Calcutta Electric Supply Workers Union* A.I.R. 1959 S.C. 1191, 1193; *K.C. Mathews v. Kumpulan Guthrie Sdn. Bhd.* [1981] 2 M.L.J. 320; *Rookes v. Barnard* [1964] A.C. 1129, 1180-1181, 1204; *Morgan v. Fry* [1968] 2 Q.B. 710, 724, 726-728, 734, 736, 738; *Chappell v. Times Newspapers* [1975] 2 All E.R. 233; [1975] 1 W.L.R. 482; *Simmons v. Hoover Ltd.* [1977] 1 All E.R. 775, 776, 784; *United Engineering Workers Union v. Devanayagam* [1967] 2 All E.R. 367.